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IN THE

Supreme Court of the United States

October Term, ~~1950~~ 51

No. ~~612~~ 12

PETER ALFONS BINDCZYCK, *Petitioner*,

v.

THOMAS G. FINUCANE, Individually and as Chairman of the Board of Immigration Appeals, et al., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT.

JOSEPH A. FANELLI,
Washington, D. C.

ISIDORE ENGLANDER,
New York City, New York.

Washington, D. C.,
March, 1951.

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Petitioner, by his counsel herein, prays that a writ of certiorari be issued to review the judgment of the Court of Appeals for the District of Columbia Circuit entered in this proceeding on June 19, 1950.

OPINIONS BELOW.

The judgment of the District Court (R. 20-21) was issued without opinion. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 23ff.) is reported at 184 F. (2) 225.

JURISDICTION.

The judgment of the Court of Appeals (R. 33) was entered on June 19, 1950. A petition for rehearing timely filed (R. 34) was first denied by order of the Court of Appeals entered on September 28, 1950 (R. 45). On November 21, 1950, the Court of Appeals on its own motion vacated its order of September 28, 1950, denying the petition for rehearing (R. 47). The petition for rehearing thus left pending for consideration by the Court of Appeals was denied by order of that Court entered on December 21, 1950 (R. 48). The jurisdiction of this Court is invoked under the provisions of 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. In Section 338 of the Nationality Act of 1940, Congress provides for the setting aside and revoking of citizenship under a detailed procedure therein laid down which provides safeguards for the citizen whose citizenship is attacked. The first and main question presented is whether Section 338 of the Nationality Act is exclusive and hence compulsory upon the Government for valid revocation of citizenship.

2. If the first and main question were answered in the negative, a second question would be presented: Whether the revocation of petitioner's citzenship obtained upon a motion filed, served, heard and decided upon the same day when petitioner was away from home, under military arrest and without counsel was void under the Constitution, Section 8, clause 4, and the Fifth and Fourteenth Amendments.

STATUTE INVOLVED.

Section 338 of the Nationality Act of 1940, 8 U. S. C. 738, 54 Stat. 1158, provides that:

> "(a) It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court specified in subsection (a) of

section 301 in the judicial district in which the naturalized citizen may reside at the time of bringing suit, for the purpose of revoking and setting aside the order admitting such person to citizenship and canceling the certificate of naturalization on the ground of fraud or on the ground that such order and certificate of naturalization were illegally procured.

"(b) The party to whom was granted the naturalization alleged to have been fraudulently or illegally procured shall, in any such proceedings under subsection (a) of this section, have sixty days' personal notice in which to make answer to the petition of the United States; and if such naturalized person be absent from the United States or from the judicial district in which such person last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place ~~where~~ such suit is brought."

STATEMENT OF THE CASE.

The facts are not in dispute. As largely alleged in petitioner's complaint in the District Court, and admitted upon respondents' motion to dismiss, the pertinent facts may be simply summarized as follows:

Petitioner, Peter Bindczyck (pronounced as if spelled "Binchick"), became a citizen of the United States by naturalization in the Circuit Court of Frederick County, Maryland, on December 2, 1943, and his certificate of naturalization was duly issued by that court. (R. 3).

Petitioner has never lost his United States citizenship by expatriation or otherwise. And the order of the Circuit Court of Frederick County admitting petitioner to citizenship has never been revoked and set aside pursuant to the provisions of Section 338 of the Nationality Act of 1940. (R. 3).

In Section 338 of the Nationality Act of 1940, 8 U. S. C. Sec. 738, the Congress laid down a detailed procedure for proceedings to revoke and set aside an order admitting a person to citizenship and to cancel the certificate of natural-

ization issued. In paragraph (a) of that Section, the Congress specified *first:* who shall institute such proceedings —the United States District Attorney; *second:* what shall move the United States District Attorney to institute such proceedings—an affidavit showing good cause; *third:* what courts shall have jurisdiction to handle such proceedings—those courts which have jurisdiction to naturalize aliens; *fourth:* where such proceedings shall be brought—in the judicial district where the naturalized citizen resides at the time of bringing suit against him to revoke his citizenship; and *fifth:* the grounds upon which an order admitting to citizenship shall be revoked and the certificate of naturalization cancelled—two grounds specified, fraud and illegal procurement.

In a separate paragraph (b) of Section 338 Congress specified *sixth:* the extent and type of notice to the citizen whose naturalization is alleged to have been fraudulently or illegally procured—the citizen "shall . . . have sixty days' personal notice in which to make answer to the petition of the United States." And finally, the Congress specified, too, the mode and detail of service upon the citizen in the event of his absence from the judicial district of residence.

On December 9, 1943, a motion was filed in the proceeding in the Circuit Court of Frederick County, Maryland, in which petitioner had been naturalized (R. 5; 19). The motion was "to vacate and set aside the order of admission" of petitioner "to citizenship." The motion purported to be "on behalf of the United States Government" (R. 19); but was in no sense the "institution of proceedings" by a "petition of the United States." See Section 338 of the Nationality Act of 1940. The motion was not signed and filed by the United States District Attorney for the judicial district in which Frederick County, Maryland, is located, as required by Section 338. So far as appears from the record, the United States District Attorney was never consulted, or, if consulted, declined to file and prosecute any such motion. The motion was signed and filed by

someone by the name of Cook, a "naturalization examiner of the Immigration and Naturalization Service, Washington, D. C." (R. 19-20). At the time of the filing of the motion, petitioner, a soldier in the United States armed forces, was under military arrest at Camp Ritchie, Maryland; but his residence was and is New York. (R. 3; 6; 12; 14). The motion apparently was accompanied by an affidavit executed by a corporal; but whether in accordance with Section 338 the affidavit would have shown "good cause" to a United States District Attorney had there been one is doubtful; for the affidavit (R. 11-12) in one short paragraph merely sets forth what petitioner was supposed to have said to two commissioned officers (who were available, R. 15), in conversations lasting over one hour and a half. The corporal did not indicate the source of such knowledge.

Section 338 requires sixty days' notice of proceedings to revoke and set aside an order of citizenship. The motion to revoke and set aside the order admitting petitioner to citizenship was served, filed, heard, and decided on the same day, December 9, 1943. (R. 5; 13 ff.). The Circuit Court of Frederick County on that day entered an order vacating and setting aside the order which had admitted appellee to citizenship and cancelling his certificate of naturalization. The ground of such action is stated in neither the motion (R. 13; 19-20), nor the court's order (R. 20); although, admittedly, the general atmosphere of the proceedings (R. 11-20) would indicate that what Cook had in mind was something in the nature of fraud.

The motion and order thereon vacating and setting aside petitioner's citizenship did not comply with Section 338. (R. 5-6). The respondents concede the non-compliance (R. 6). Nevertheless, as the officials of the Government concerned with the deportation of aliens, they rely on the order which ignored Section 338, and insist on deporting petipetitioner as an alien (R. 4-5; 6).

Such deportation and denial of petitioner's citizenship would deprive him of the following rights and privileges of a citizen and national of the United States: (1) the right

to live in the United States, his home ever since 1938; (2) the right to pursue happiness in the midst of his family, consisting of his wife, child, and close blood relatives of his wife; and since they are all native-born American citizens to remain with them in the United States; (3) the right to support his wife and child in the United States by pursuing his lawful occupation of tool worker and designer; (4) the privilege of voting in United States elections; and (5) the right to be free of the application to him of statutes, rules and procedures which pertain solely to aliens. (R. 4).

Hence, petitioner began this proceeding in the District Court by suit against respondents, all agency heads in the Department of Justice concerned with deportation of aliens.[1] The suit sought a judgment declaring petitioner to be a citizen national of the United States. Such suit is expressly authorized by Section 503 of the Nationality Act of 1940, 8 U. S. C. 903.

The District Court was of the view that Section 338 of the Nationality Act of 1940 is exclusive in providing the only method for setting aside and revoking citizenship. Hence, the District Court granted petitioner summary judgment declaring him to be a national and citizen of the United States (R. 20-21). Such judgment was expressly stated to be "without prejudice to the government's right to institute appropriate proceedings for denaturalization under Sec. 338 of the Nationality Act of 1940" (R. 21).

Our defense to the assertion of fraud in petitioner's naturalization still awaits the institution of Section 338 proceedings which provide the opportunity for the taking of counsel and the preparation of a defense. It is an odd kind of fraud that can be attempted to be proven only with the elimination of all opportunity to be at liberty, to take counsel, to know one's rights, to know the consequences of action or non-action, to prepare a defense, to have the time

[1] The agency heads orginally included Mr. Justice Clark, who was then Attorney General. Respondent J. Howard McGrath has since been substituted for Mr. Justice Clark.

to recover from serious mental and emotional disturbance and to think true and act calmly. But the respondents appealed from the order of the District Court.

The Court of Appeals reversed with instructions to the District Court to dismiss petitioner's complaint (R. 33).

The Court of Appeals was of the following view: If Cook, the naturalization examiner, had "purported to have acted pursuant to the provisions of [Section 338]" the Court would not have hesitated to affirm the District Court judgment in petitioner's favor, for, as the Court observed "the authorities are abundantly clear in denying the allowance of the order vacating and setting aside a naturalization where the strict letter of section 338 as laid down by Congress is not followed" (R. 25). However Cook did not "purport" to follow Section 338, and hence, the Court below said, that Section did not preclude the setting aside of petitioner's naturalization on a motion filed within the same term as the naturalization (R. 26; 32). The Court disposed of the serious, constitutional question resulting from its view by stating that petitioner waived his constitutional rights, apparently in the argument of his counsel before the Court (R. 24).

A petition to rehear (R. 35-43) attacked substantial errors (in our view) in the Court's decision; insisted that the record does not show that the setting aside of petitioner's naturalization was in the same term as his naturalization; and denied any waiver of the constitutional question. The petition to rehear was denied without opinion (R. 45; 48).

REASONS FOR GRANTING THE WRIT.

1. **The decision of the Court below conflicts with the decisions of other Circuit Courts of Appeals.**—The Court below held that without regard to Section 338 of the Nationality Act of 1940, a naturalized citizen can lose his citizenship upon motion filed in the naturalizing court within the same term as the naturalization. The Court of Ap-

peals for the Seventh Circuit, upon facts practically identical with ours, holds precisely the opposite. *United States ex rel. Volpe* v. *Jordan*, 161 F. (2) 390 (C.C.A. 7th, 1947). There the Court holds that Section 338 is exclusive for the setting aside of citizenship, and specifically that statutory or court rules as to setting aside of judgments within a term are irrelevant for, as in all matters of naturalization, the power to revoke naturalization must stem from the Congress. The Court below recognizes the *Volpe* case as a "clear authority" (R. 27) in petitioner's favor.

The Court below denies that it is otherwise in conflict with any decision (R. 26-27). We respectfully urge, nevertheless, a conflict between the decision below and the following decisions of the Second, Third, Fifth, and Seventh Circuit Courts of Appeal: *U. S.* v. *Watkins*, 168 F. (2) 883 (C.C.A. 2nd, 1948); *U. S.* v. *Stabler*, 169 F. (2) 995 (C.C.A. 3rd, 1948); *U. S.* v. *Kiriaze*, 172 F. (2) 1000 (C.C.A. 5th, 1949); *U. S.* v. *Sotis*, 131 F. (2) 783 (C.C.A. 7th, 1942); and *U. S. ex rel. Harrington* v. *Schlotfeldt*, 136 F. (2) 935 (C.C.A. 7th, 1943), cert. den. 327 U. S. 781. In those cases, the Government, in obtaining or seeking revocation of naturalization, had generally complied with the requirements of Section 338. The question was the necessity for compliance with one particular detail of Section 338 omitted by the Government, or asserted by the defending citizen to have been omitted by the Government. In each of those cases the Court held revocation valid only if the requirements of Section 338 had been met down to the last detail.[2] The Court below recognizes the validity of those cases (R. 26); but seeks to distinguish them on the ground that, whereas in those cases the Government sought to comply

[2] In the *Sotis*, *Watkins*, and *Kiriaze* cases (cited in the text) revocations of citizenship previously obtained by the Government were struck down for want of strict compliance with Section 338. The *Harrington* and *Stabler* decisions applied the same requirement of strict compliance with Section 338, and upheld the revocations of citizenship there involved because strict compliance with Section 338 was found.

with Section 338, here the Government ignored Section 338 altogether. As the Court below put it, Cook, the naturalization examiner, did not "purport to have acted pursuant to the provisions of" Section 338 (R. 25). The distinction raises more problems inviting review by this Court than it avoids; for if the distinction be valid two startling doctrines result which negate the whole development and trend of the law on the obligations of Government officials and the abandonment of medieval requirements in pleading. The two doctrines are: first, the disturbing concept that federal Government officials are less bound to comply with a federal statute if they ignore it completely rather than only in part; and second, a doctrine of labels which teaches that questions of American citizenship are to turn upon whether or not the moving papers are expressly designated to be pursuant to a federal statute. However, in our view, the distinction offered by the Court below is without substance; and its decision does conflict with the decisions in four circuits which we have cited in this paragraph.[3]

2. **The federal question presented as to the applicability of the safeguards of Section 338 to all revocation of citizenship is of general importance.**—Petitioner's citizenship was revoked on notice of less than one day and in disregard of all the safeguards provided in Section 338. Such action does not appear to have been a "sport" in the administration of our citizenship law. The respondents, although they lost in the District Court, appealed and continued to insist on a right to revoke citizenship without regard to Section 338. They still so insist.

The reported decisions passing upon the obligation of the Government to comply with Section 338 are not so many (see Point 1, *supra*). However, in ordering peti-

[3] In accord with the cited decisions of the Courts of Appeal in the Second, Third, Fifth and Seventh Circuits is a District Court decision in the Tenth Circuit, *U. S.* v. *Gronich*, 211 Fed. 548 (W. D. Wash., 1914); and see *U. S. ex. rel. Lapides* v. *Watkins*, 165 F. (2) 1017 (C. C. A. 2nd, 1948).

tioner deported, respondent, Thomas G. Finucane, insisted that the Government, without observing the safeguards of Section 338, has in a number of cases obtained revocation of citizenship granted in the same term. That these actions in disregard of Section 338 are not reported is not surprising. Petitioner pursues this three-tier litigation because denaturalization for him threatens deportation and the loss of country, home and family (all that makes life worthwhile), and because he has been able to obtain counsel. But usually a citizen of the United States is not subject to deportation on revocation of his citizenship and has neither the money, nor the legal advice requisite for a protracted contest. Hence the lack of reported cases on the Government's methods for revoking citizenship in disregard of Section 338.

In a very real sense, petitioner represents the rights of all our citizens, recently naturalized; and we respectfully suggest review here to determine whether in dealing with this group of our citizens, who most need protection, the Government, too, is required "to turn a square corner".

3. **The Court below decided a federal question in a way probably in conflict with applicable decisions of this Court.**—We recall as to revocation of citizenship that "in its consequences it is more serious than a taking of one's property, or the imposition of a fine or other penalty". *Schneiderman* v. *U. S.*, 320 U. S. 118, 122. A revocation suit "is not a criminal proceeding. But neither is it an ordinary civil action since it involves an important adjudication of status." *Schneiderman* v. *U. S.*, just *supra* at p. 160; *Baumgartner* v. *U. S.*, 322 U. S. 665, 675. The constitutionality of the jurisdiction to revoke citizenship conferred by Section 338 was sustained by this Court with the observation that such jurisdiction to revoke is conferred only "under conditions affording to the party whose rights are brought into question full opportunity to be heard". *Johannessen* v. *U. S.*, 225 U. S. 227, 241. For such reasons, this Court firmly interprets Section 338 as requiring the

Government to produce "clear, unequivocal, and convincing evidence which does not leave the issue in doubt" before citizenship can be revoked. *Knauer* v. *U. S.*, 328 U. S. 654, 657; *Schneiderman* v. *U. S.*, 320 U. S. 118, 123, 125; *Baumgartner* v. *U. S.*, 322 U. S. 665, 670.

The *Knauer-Schneiderman-Baumgartner* doctrine rather plainly demands the striking down of the purported revocation of petitioner's citizenship. The procedure that rushed petitioner to loss of citizenship on hearsay and questionable evidence (R. 11-19) in less than a day, and without the opportunity afforded to him to take counsel and prepare a defense, does not square with the extreme protection of the citizen required by the *Knauer, Schneiderman,* and *Baumgartner* decisions. Cf. *U. S.* v. *Kiriaze,* 172 F. (2d) 1000, 1002 (C.C.A. 5th, 1949).

Admittedly, this Court's decisions in *Knauer, Schneiderman* and *Baumgartner* were concerned with revocation proceedings expressly brought by the Government under Section 338. Here the revocation proceeding was not designated as under Section 338. But the reasons for the *Knauer-Schneiderman-Baumgartner* protection of our citizens are applicable to revocation of citizenship under any label. And, if the letter and the spirit of that protection were applicable only to Section 338 proceedings, there would be little point to those decisions; for the protection could be eliminated by merely ignoring Section 338, as in petitioner's case.

Finally, in naturalization matters, whether the matter be revocation or grant, the procedures enacted by Congress are controlling. That rule is indubitably established on the grant side by decisions of this Court. *U. S.* v. *Ginsberg,* 243 U. S. 472 (statutory provision for naturalization hearing in "open court" requires precisely such a hearing, and naturalization conferred upon a hearing held partially "in chambers" was rightly revoked in Section 338 proceedings); *Maney* v. *United States,* 278 U. S. 17 (statutory provision for the Government's protection of ninety days no-

tice to the Government of naturalization hearing requires no less than ninety days, and naturalization conferred upon seventy days notice of naturalization hearing was rightly revoked in Section 338 proceedings); see *Baumgartner* v. *U. S.*, 322 U. S. 665, 672 (all statutory conditions for naturalization must be satisfied). With specific reference to the naturalization statute this Court has taught that: "Courts are without authority to sanction changes or modifications; their duty is rigidly to enforce the legislative will in respect to a matter so vital to the public welfare". *U. S.* v. *Ginsberg, supra* at page 474.

Since statutory procedures are controlling for the grant of naturalization, they also control the revocation of naturalization. See the *Volpe, Watkins, Stabler, Kiriaze, Sotis* and *Harrington* decisions, all cited *supra* in Point 1. If, for example, the Government must have its ninety-days notice of naturalization hearing even though the seventy-days notice it did get prejudiced it not (the *Maney* case in this Court), then a citizen of the United States must have his sixty-days notice of revocation of naturalization hearing when the notice of less than one day he did get prejudiced him severely (petitioner's case). Grant and revocation are but two sides of the same coin. The legislative will with respect to both, so vital to the public welfare, is equally compelling. Compare *Ginsberg* and *Maney* on the grant side with *Schneiderman, Baumgartner* and *Knauer* on the revocation side, all decisions of this Court, cited *supra*.

We claim a conflict between the decision below and this Court's decisions in *Ginsberg, Maney, Schneiderman, Baumgartner* and *Knauer*. The urging of this Court's decisions upon the Court below met with silence.

CONCLUSION.

For the foregoing reasons, it is respectfully submitted that the petition should be granted.

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